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Institutional Professionalism for Lawyers: Realizing the Virtues of Civic Professionalism

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INSTITUTIONAL PROFESSIONALISM FOR LAWYERS: REALIZING THE VIRTUES OF CIVIC PROFESSIONALISM

**WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM
IN AMERICA. By William M. Sullivan. San Francisco: Jossey-Bass, 2005
(2d ed.) Pp. 327. \$30.00.**

Reviewed by Steven K. Berenson

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I. INTRODUCTION

Are lawyers part of the problem, or part of the solution? Of course, answering this question first requires answers to the embedded questions of exactly what problem and what solution we are talking about. But putting those foundational inquiries aside for the moment, evidence abounds as to possible answers to the principal question. Supporting the “part of the problem” answer, are the consistent results of public opinion polls which demonstrate the extremely low regard Americans have for lawyers as a whole.¹ There are also the

¹ The Gallup Corporation conducts an annual poll in which it asks members of the public to rank various professional groups in terms of their “honesty and ethical standards.” Lawyers always finish near the bottom of the list. In 2005, lawyers finished thirteenth out of twenty-one occupational groups. See <http://www.pollingreport.com/values.htm> (last visited Sept. 4, 2006); accord DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 4 (2000) (citing to an earlier such survey).

ubiquitous lawyer jokes that make the rounds,² along with unflattering portrayals of lawyers in popular culture vehicles such as movies and television shows.³ Additionally, debates in the popular media regarding “tort reform” proposals are rife with examples of overreaching and the filing of frivolous lawsuits by attorneys.⁴

On the other hand, despite the low regard in which members of the public hold lawyers generally, opinion polls demonstrate that most Americans who have actually been represented by an attorney were quite pleased with that attorney’s performance with regard to the particular representation.⁵ And leading figures within the legal profession certainly offer many examples of ways in which lawyers contribute to the public good, whether in terms of their defense of civil rights and civil liberties,⁶ or their contributions to the peaceful and efficient resolution of disputes,⁷ economic growth,⁸ and the spread and development of the “rule of law” around the world.⁹ Thus, there is evidence to support the “part of the solution” answer as well.

In the second edition of his study of the American professions entitled, *Work and Integrity: The Crisis and Promise of Professionalism in America*,¹⁰ William M. Sullivan contends that the problem lies in the withdrawal of large

² Mark Galanter recently published a book in which he thoughtfully explores the implications of many such lawyer jokes. See MARK GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005).

³ See, e.g., Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533 (2000).

⁴ For example, in a recent case, a plaintiff who was seriously disfigured by a botched liposuction procedure successfully sued a yellow pages publisher for allowing a dermatologist to falsely advertise themselves as a board certified plastic surgeon. See Myron Levin, *Legal Urban Legends Hold Sway: Tall Tales of Outrageous Jury Awards Have Helped Bolster Business-Led Campaigns to Alter Civil Justice System*, L.A. TIMES, August 14, 2005. However, it turns out that many of the most outrageous examples of frivolous lawsuits that have made the rounds over the internet or even in established print media sources are complete fabrications. *Id.*

⁵ See, e.g., Michael Lamb, *It’s No Joke . . . Slurs Against Lawyers May Offend Us, But We Are a Respected Profession Despite Our “Image Problem,”* 24 MONT. LAW. 1, 10-11 (March 1999) (citing a 1993 ABA poll indicating that two thirds of the people who had hired a lawyer in the last ten years were satisfied with the lawyer’s performance); accord W. Bradley Wendel, *How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections*, 54 S.C. L. REV. 1027, 1034 & n.21 (2003).

⁶ See, e.g., Robert A. Stein, *Advancing the Marshall Legacy*, 84 A.B.A. J. 82 (1998) (recognizing the work of the ABA Section on Individual Rights and Responsibilities).

⁷ See, e.g., John C. Shepherd, *Passports for Peace Among Nations*, 71 A.B.A. J. 8 (1985) (discussing lawyers’ special skills relating to the peaceful resolution of disputes).

⁸ See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Business Lawyers and Value Creation for Clients*, 74 OR. L. REV. 1 (1995) (focusing on the value of the role of lawyers in creating economic wealth).

⁹ See, e.g., Michael S. Greco, *Advancing the Rule of Law: ABA’s Efforts to Promote Stable Justice Systems and Economic Growth Around the World*, 92 A.B.A. J. 6 (2006).

¹⁰ WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* (2d ed. 2005).

numbers of citizens from public participation in American democratic governance, largely as a result of changes wrought by globalization, the “new economy,” and a runaway focus on individual, material enhancement. Sullivan, who is a senior scholar at the Carnegie Foundation for the Advancement of Teaching,¹¹ and is the author of other important works addressing contemporary social issues from a communitarian perspective,¹² further contends that the solution to this problem depends upon reconnecting individuals to a higher sense of the public good, and reinvigorating their participation in institutions designed to encourage engagement in the struggle to define and achieve such a public good. *Work and Integrity* asks of the American professions generally, the question we started out with in regard to lawyers particularly – will they be part of the problem or part of the solution, given Sullivan’s above-described identification of malady and cure.

Rather than offering a simple, yes or no answer to the question posed, Sullivan’s conclusion is that professionals may become either part of the problem, or part of the solution, depending on which version of professionalism they embrace. Throughout the book, Sullivan offers two contrasting visions of professionalism. The first, which he labels “technical professionalism,” involves the professional in developing and employing expertise attained in the professional’s sphere of specialized knowledge, primarily for the purpose of enhancing the individual professional’s social standing or material well being.¹³ The alternative to technical professionalism that Sullivan presents is what he refers to as “civic professionalism.”¹⁴ Though civic professionals must possess expert knowledge along similar lines to technical professionals, civic professionals employ this expertise in pursuit of the common good, or public interests rather than their own self-regarding interests.¹⁵ Not surprisingly, Sullivan concludes that in order for professionals to be part of the solution, rather than the problem, they must embrace civic professionalism rather than technical professionalism.¹⁶ However, this outcome is not assured, as the above-described forces of global-

¹¹ See Staff Directory – William Sullivan, <http://www.carnegiefoundation.org/about/sub.asp?key=10&subkey=290> (last visited Sept. 30, 2005). Sullivan is presently working on the Foundation’s Preparations for the Professions Program, a comparative study of professional education in medicine, nursing, law, engineering, and the preparation of the clergy. See Program Areas – Preparation for the Professions Program, <http://www.carnegiefoundation.org/ppp/index.htm> (last visited Sept. 30, 2005). Jossey-Bass will publish separate books regarding education in each of these professions as part of the project. At the time Sullivan published the first edition of *Work and Integrity* in 1995, he was a professor of philosophy at LaSalle University. See SULLIVAN, *supra* note 10, at xvii.

¹² Sullivan’s other published works include *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985) and *THE GOOD SOCIETY* (1995), each of which he co-authored with Robert Bellah and others.

¹³ See SULLIVAN, *supra* note 10, at 9.

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.*

ization, specialization, and “new” economics appear to be pushing in the direction of technical professionalism.¹⁷ Therefore, in order to achieve his desired end, Sullivan contends that professionals must make a conscious effort both to embrace the values behind civic professionalism, as well as to find ways to advance civic professionalism in the day to day practice of their trades.¹⁸

I share both Sullivan’s concern regarding civic disengagement generally, and his desire to see professionals embrace a vision of professionalism that places greater emphasis on civic engagement than is presently the case. However, at least in the case of the legal profession in particular, a deeper analysis of the profession than Sullivan provides is necessary in order to see the way to a possible renewal of civic professionalism on the part of lawyers. In part, this review essay will attempt to add depth to Sullivan’s analysis of the challenges that currently face the legal profession. Additionally, the Essay will present one potential path leading in the direction of greater civic professionalism on the part of lawyers.

Sullivan’s treatment of the concept of professionalism is wide-ranging and thorough. Sullivan offers a historical account of the development of the professions in America, going back before the founding of the American republic to the emergence of the professions in pre-colonial Europe.¹⁹ Sullivan then traces the development of the professions throughout American history, demonstrating both the emergence of each of the two types of professionalism identified above, and periods throughout American history in which one form of professionalism was dominant, and the other recessive.²⁰ He identifies the present as a period in which technical professionalism enjoys dominance.²¹ The ultimate goal of the book, therefore, is to encourage a resurgence of civic professionalism that can challenge the current dominance of technical professionalism.²² Part II of this review Essay will attempt to summarize Sullivan’s main points, utilizing some of the historical examples he offers to illustrate his archetypes of technical and civic professionalism, as well as to discuss in greater detail his diagnosis of the impact of current conditions on the type of professionalism presently in vogue.

Sullivan does not focus his attention exclusively on any one particular profession. Rather, Sullivan devotes attention to a wide range of American professions including law, medicine, clergy, teaching, academia, architecture, and engineering. His goal is certainly to address the concept of professionalism generally, rather than to focus on any particular profession. Nonetheless, in some instances, Sullivan does use a particular profession as a “case study” to

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 6-15.

¹⁹ *Id.* at 69-70.

²⁰ *Id.* at 70-158.

²¹ *Id.* at 158-60.

²² *Id.* at 32-33.

illustrate a particular point, or engage in an extended analysis of a particular profession with regard to discussion of a broader issue. Though there are only a few instances where Sullivan engages in a detailed discussion of the legal profession, these discussions will be reviewed in Part III of this Essay.

On first analysis, employment of the term “integrity” in the title to Sullivan’s book is somewhat curious. That is because only a few pages of the book are explicitly devoted to discussion and analysis of the concept of integrity. Nonetheless, it may well be the case that notions of integrity are implicit in other discussions of professionalism throughout the book. In any event, there has recently been some interesting legal scholarship devoted to the question of the place of the concept of integrity in developing a conception of the appropriate professional role for lawyers. Thus, Part IV of this Essay will compare Sullivan’s notion of integrity to this recent scholarship regarding the significance of the concept of integrity to an appropriate conception of attorney professional role.

Part V of this Essay will be devoted to an attempt to superimpose Sullivan’s analysis upon the field of contemporary legal academic scholarship regarding the appropriate professional role for lawyers. More specifically, analogues to Sullivan’s archetypes of technical professionalism and civic professionalism can be found in recent legal ethics scholarship. However, it is my contention that contemporary academic legal ethics scholarship actually divides further into two separate subdivisions within each of Sullivan’s categories of technical and civic professionalism. Thus, Part V of this Essay identifies certain recent law review articles as falling within the newly-created categories of market or craft technical professionalism, and individual or collective civic professionalism.

If one agrees that the problem identified by Sullivan of civic or democratic disengagement is a real one (even if one is not willing to go so far to characterize it as “the” problem, as I suggest above), and that the solution sought by Sullivan of reconceiving professionalism in a way that will encourage civic or democratic reengagement by professionals is worth pursuing, then one is likely to be drawn to the academic legal scholarship that corresponds to Sullivan’s category of collective civic professionalism. However, a review of that literature reveals a relative paucity of focus on institutions, which Sullivan contends are central to the development of civic professionalism. Therefore, this essay concludes with a call for additional work regarding the role of institutions in promoting collective civic professionalism, as well as the role of individual lawyers within those institutions, as a way of joining Sullivan’s broader effort to reconceive professionalism.

II. SUMMARY OF SULLIVAN'S KEY POINTS

Sullivan begins his analysis of professionalism in America with a definition of the term that should seem familiar to those who have reviewed academic legal scholarship concerned with the issue.²³ He identifies three features that characterize a profession: (1) “specialized training in a field of codified knowledge usually acquired by formal education and apprenticeship;” (2) “public recognition of a certain autonomy on the part of the community of practitioners to regulate their own standards of practice;” and (3) “a commitment to provide service to the public that goes beyond the economic welfare of the practitioner.”²⁴ By way of shorthand, I will refer hereinafter to these three features as “special knowledge,” “self-regulation,” and “public spiritedness” respectively. It seems that Sullivan believes that a vision of professionalism that would be beneficial to a democratic society would be one that embraces each of these three factors in relatively equal proportion. However, in circumstances where one of these factors comes to dominate over the others, the result is one of the negative versions of professionalism identified above.

For example, where professionals become excessively focused on their specialized knowledge at the expense of their commitment to the broader public interest (public spiritedness), the results are not encouraging. Because the professionals’ specialized knowledge has great value to those who can afford to pay for it, when professionals are untethered by a strong commitment to the broader public interest, individual professionals’ economic self-interest may overwhelm their public spiritedness. The result is the version of professionalism that Sullivan describes as technical professionalism.²⁵ The dangers here are exacerbated in situations of increased economic inequality, as professionals end up sharing their special knowledge with the relatively narrow segment of the population that can afford the high cost of the professionals’ services, as driven by the professionals’ efforts to maximize their own economic well being.²⁶ However, the broader populace is deprived of the benefits of the professionals’ special knowledge.

On the other hand, where professionals exploit excessively their self-regulatory status, the results may be similarly unsatisfactory. Because professionals can to varying degrees control the supply of their profession’s services, the result may be economic advantage to the profession, again at the expense of the profession’s duty to the public at large. Such restrictions can occur through limitations on entry into the profession, for example by requiring certain levels

²³ See, e.g., Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1238-41 (1995) [hereinafter Pearce, *Professional Paradigm*].

²⁴ SULLIVAN, *supra* note 10, at 36.

²⁵ *Id.* at 9.

²⁶ *Id.* at 8-9.

of education and training before being admitted to practice,²⁷ or through entry criteria such as professional examination and licensing requirements. Substantive professional regulations may also have the effect of limiting the supply of professional services. Sullivan describes the result as a “market shelter” for the profession’s services, an at least partial exemption from the economic forces that impact the conditions of work in other occupations.²⁸ In any event, the benefits of such market shelters inure to individual professionals, at the expense of their particular clients and the society at large.

Naturally, the counter to the threat of either the special knowledge or self-regulation factors coming to dominate are efforts to ensure that the public spiritedness factor remains of equal prominence to the other two. And this effort to ensure that concern for the broader public interest remains a central component of any version of professionalism is what Sullivan describes as civic professionalism.²⁹ At least in theory, it might be assumed that if the public spiritedness feature came to dominate the other two components of professionalism, the results would be similarly unsatisfactory to dominance by either of the other two components. However, not surprisingly, Sullivan’s historical analysis of American professionalism does not reveal an actual example of a period in which the public spiritedness component came to dominate the other two.³⁰

The primary check that Sullivan offers to assure relative balance between the three components of professionalism is a social contract between members of the professions and the members of the public that the professions serve.³¹ This contractarian approach should be familiar to readers of legal scholarship regarding professionalism.³² Generally put, the bargain between the profession and the public that is embodied in the contract is that the public will grant to the profession the measure of self-regulation it seeks, as well as the enhanced social and economic status that accompanies exploitation of the profession’s specialized knowledge, in exchange for which the profession agrees to

²⁷ Sullivan traces this ability to the movement in professional training from apprenticeship to university education. *Id.* at 53.

²⁸ *Id.* at 13.

²⁹ *Id.* at 5-6.

³⁰ See *infra* notes 37-73 and accompanying text. Perhaps an actual example of this phenomenon was offered by revered clinical law professor Gary Bellow. Bellow was critical of the “first generation” of anti-poverty lawyers to emerge in the 1960s on grounds that, although these lawyers’ commitment to social justice and a more egalitarian society was unwavering, he believed many focused on these issues at the expense of learning the craft of lawyering, and therefore diserved their ultimate objectives. Cf. Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 N.L.A.D.A. BRIEFCASE 106, 117-18 (1977). In my description of Sullivan’s terms, Bellow’s claim is that these lawyers’ public spiritedness took undue precedence over their special knowledge. See also Jean Charn, *Service and Learning: Reflections on Three Decades of the Lawyering Process at Harvard Law School*, 10 CLINICAL L. REV. 75, 83 (2003) (quoting David Grossman’s eulogy to Bellow).

³¹ SULLIVAN, *supra* note 10, at 54-55.

³² See, e.g., Pearce, *Professional Paradigm*, *supra* note 23, at 1238.

use its specialized knowledge in pursuit of its clients' interests, and the public interest generally.³³ However, as mentioned above, and as will be discussed in greater detail below, Sullivan, and others,³⁴ believe that present circumstances have placed a severe strain on this arrangement. Indeed, Sullivan ultimately calls for a new social contract between professionals and broader society, to ensure that the public spiritedness component of professionalism be revived to take its place as an equal alongside the other components of professionalism.³⁵

In order to provide support for his analysis, Sullivan offers a lengthy historical account of the development of professionalism in America. Though Sullivan's focus is American professionalism, he does note the roots of domestic professionalism in the medieval guilds of the European Universities.³⁶ He also notes however, the tension created by efforts to import European style professionalism to the U.S. colonies, given the democratic and egalitarian nature of the emerging nation, as compared to the elitism that is inherent in notions of professionalism.³⁷ On the other hand, early America did embrace the post Enlightenment faith in the ability of reason to solve human problems, a faith which is supported by the specialized knowledge component of professionalism.³⁸ The result of these facts was the creation of professions in the U.S. that were smaller in scale, and more independent than their European counterparts, which were often affiliated with large institutions such as the church and the state.³⁹ For these reasons though, the professions in America did not have an overwhelmingly large impact for much of the country's early history.

Indeed, to the extent that the professions thrived at all in early America, it was through a movement that Sullivan describes as the "free professions."⁴⁰ Relatively untethered to major institutions of church and state, individual professionals sought to enhance their status by associating with "wealthy gentleman farmers and merchants of the eastern cities and towns."⁴¹ Additionally, professionals began to come together in a variety of voluntary and informal associations of the type that Alexis de Tocqueville took particular note of in his famous work, *Democracy in America*.⁴² Of course, de Tocqueville's particular descrip-

³³ See SULLIVAN, *supra* note 10, at 54-55, 68; Pearce, *Professional Paradigm*, *supra* note 23, at 1238.

³⁴ See Pearce, *Professional Paradigm*, *supra* note 23, at 1256-63.

³⁵ SULLIVAN, *supra* note 10, at 60.

³⁶ *Id.* at 52.

³⁷ *Id.* at 68.

³⁸ *Id.* at 68-69.

³⁹ *Id.* at 69.

⁴⁰ *Id.* at 72.

⁴¹ *Id.*

⁴² *Id.* at 73.

tion of lawyers making up a sort of American aristocracy has been widely-cited.⁴³

However, this association with elites, along with the perception that members of professions were themselves becoming part of such an American elite, also made the professions key targets for the populist backlash against elitism of all forms endorsed by Andrew Jackson in his rise to the Presidency in the 1830s.⁴⁴ Indeed it was not until Lincoln assumed the Presidency, with his own unique combination of both humble roots (appealing to populists) and highly regarded credentials as an attorney (appealing to elites), that the professions in America began to enjoy a return to favor.⁴⁵

It was not until the late Nineteenth Century that the professions in America reached an initial apogee in terms of their influence with the onset of the industrial revolution.⁴⁶ This era of "corporation capitalism"⁴⁷ unleashed previously unprecedented needs for technical and expert knowledge, and professionals helped to fill this need with the special knowledge that they possessed.⁴⁸ Additionally, the new industries created great concentrations of wealth that proved irresistible for many professionals to seek to share in. The result was an era in which a form of technical professionalism dominated over alternative conceptions.⁴⁹ Indeed, the concentration of wealth in the hands of the corporate elite that resulted from industrialization as well as the fact that industrialization eclipsed the need for many traditional forms of skilled labor, both placed a severe strain on the American middle class.⁵⁰ Because this group had been central to civic republican ideals at the time, the result was the kind of civic withering that Sullivan contends civic professionalism is needed to combat.⁵¹

Not surprisingly, a backlash ensued from the excesses of early Twentieth Century corporate capitalism. The movement became known as Progressivism, and was fueled by the desires of members of the middle class (many of whom arrived at that position as a result of their membership in a profession) to reconnect corporations and other centers of wealth and power in the new industrial economy to broader civic objectives.⁵² As far as professionalism was concerned, the result was strong movement toward the type of civic professionalism

⁴³ *Id.* (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 264-67 (J.P. Meyer ed., Doubleday 1969) (1835)).

⁴⁴ *Id.* at 73-74.

⁴⁵ *Id.* at 76.

⁴⁶ *Id.* at 82.

⁴⁷ *Id.* at 83.

⁴⁸ *Id.* at 88. Sullivan associates this development with "Taylorism," or the incorporation of the theories of "scientific management" of Frederick W. Taylor into business settings. *Id.* at 88-90.

⁴⁹ *Id.* at 90.

⁵⁰ *Id.* at 89.

⁵¹ *Id.* at 89, 96-97.

⁵² *Id.* at 99-100.

Sullivan advocates.⁵³ Indeed, Sullivan would likely characterize the Progressive era as the high water mark in America of the kind of civic professionalism he supports. However, this period of ascendance of civic professionalism was relatively short lived. The needs of fighting two world wars, as well as responding to the results of the economic depression of the 1920s and 1930s brought about a renewed focus on forms of technical expertise and scientific knowledge, which in turn fostered a return to the forms of technical professionalism that were dominant around the turn of the century.⁵⁴ Moreover, the economic boom following the second world war, as well as the challenges brought about by the cold war, further entrenched the forces pushing in the direction of the type of technical professionalism that had dominated since the Progressive era.⁵⁵

A number of developments in the 1960s, 1970s, and 1980s served further to entrench the dominance of the technical vision of professionalism within American society. First, following the cultural upheavals of the 1960s, the Vietnam War, and the Watergate scandal, there was a profound loss of confidence in authority figures of all stripes within the United States.⁵⁶ Of course, professionals are examples of authority figures, and the status of professionals in American plummeted in response to this strain of anti-authoritarianism. Second, beginning in the 1970s, the continued economic growth and stability that had characterized the American economy since the end of World War II began to unravel.⁵⁷ Deindustrialization had profound impacts on blue collar and lower middle class workers, and the struggle to end up on the right side of the increasing divide between the “haves” and the “have nots” within America was intense.⁵⁸ Similar struggles took place within the professions themselves. Growth in numbers within the professional ranks, along with economic retrenchment generally, meant increased competition within and between professionals to attain a share of a shrinking economic pie.⁵⁹ Again, the ability to come out on top with regard to this competition was largely dependent upon professionals’ possession of the special knowledge that the few winners in the broader economic struggle were willing to pay for. The result was an increased focus on special knowledge, and a further dominance of technical professionalism.⁶⁰

Despite the economic upturn of the 1990s, and the movement into the “new” or global economy, the trend toward technical professionalism has not abated. In fact, it has only intensified. For many American workers, globalization has not eased the economic stresses of the 1970s and 1980s, but rather has

⁵³ *Id.* at 105-15.

⁵⁴ *Id.* at 128-31, 135-36.

⁵⁵ *Id.* at 133-37.

⁵⁶ *Id.* at 151-55.

⁵⁷ *Id.* at 155.

⁵⁸ *Id.*

⁵⁹ *Id.* at 156-57.

⁶⁰ *Id.*

increased the scope of the economic competition faced to a world-wide scale. This trend has correspondingly continued the trend toward increased competitiveness within the professions. On the other hand, globalization has further increased the rewards that may be gained by the winners within this broadened field of economic competition. Sullivan here relies heavily on the writings of former Labor Secretary Robert Reich. In his 2000 book, *The Future of Success*,⁶¹ Reich refers to the wonders available to the successful within this global tournament of economic competition as “the terrific deal, [the ability to get] exactly what we want instantly, from anywhere, at the best value for our money.”⁶² However, the terrific deal is only available to those, both within and outside the professions, who possess the type of special knowledge that is valued within this information based, global economy.⁶³ The lure of the terrific deal drives professionals in the direction of attaining and exploiting special knowledge,⁶⁴ precisely the type of technical professionalism Sullivan decries.

For both Sullivan and Reich, the result of this focus on expert knowledge and the quest for the terrific deal is civic disengagement.⁶⁵ And while the negative impact on society as a whole that results from such civic disengagement can be easily anticipated,⁶⁶ Sullivan and Reich also focus to a great extent on the harm to individual professionals that may result from such a single minded focus on material acquisition. Reich suggests that the quest for the terrific deal may leave in its wake a trail of damaged personal relationships, and harm to values such as connection and stability, which are essential to human flourishing.⁶⁷ Indeed, another example from Sullivan, which will be referred to in greater detail later,⁶⁸ offers a vivid portrait of the human cost to an individual lawyer that can result from a technical professionalism narrowly focused on material success.

As an alternative, Sullivan contends that the civic professionalism he espouses can lead to healing both the polity that has been damaged by civic disengagement, as well as the spirits of individual professionals who have been

⁶¹ ROBERT REICH, *THE FUTURE OF SUCCESS* (2000).

⁶² SULLIVAN, *supra* note 10, at 19 (quoting REICH, *supra* note 61, at 5).

⁶³ Such persons were referred to in Reich’s earlier book, *THE WORK OF NATIONS*, as “symbolic analysts.” See SULLIVAN, *supra* note 10, at 173 (quoting ROBERT REICH, *THE WORK OF NATIONS* 178 (1991)).

⁶⁴ To be more precise, Reich contends that it is the ability to *use* specialized knowledge, rather than its mere possession, that separates the winners from the losers in the new economy. See *id.* at 173 (citing REICH, *THE WORK OF NATIONS*, *supra* note 63, at 230).

⁶⁵ See *id.* at 19, 175.

⁶⁶ For example, Reich states that the winners in the new global economy will be “world citizens, but without accepting or even acknowledging any of the obligations that citizenship in a polity normally implies.” *Id.* at 174 (quoting REICH, *THE WORK OF NATIONS*, *supra* note 63, at 309).

⁶⁷ *Id.* at 15, 175 (quoting REICH, *THE FUTURE OF SUCCESS*, *supra* note 61, at 5).

⁶⁸ See *infra* notes 127-32 and accompanying text.

damaged by narrowly focused technical professionalism.⁶⁹ Naturally, society as a whole needs the special knowledge possessed by professionals to succeed.⁷⁰ Moreover, Sullivan does not deny the client service obligations that are inherent in the professional relationship.⁷¹ However, Sullivan contends that for society as a whole to benefit, professionals must be guided in dispensing their expertise by a sense of the public interest, in addition to their concern for the individual interests of their clients.⁷² Additionally, Sullivan points out that the very idea of a profession can only exist because individual professionals deliver their services within a broader framework of a larger collection of similar professionals who create a community of practitioners who together define the contours and meaning of the professional enterprise.⁷³ Finally, individual professionals need a sense of connection to both these broader communities, and the society as a whole, that gives meaning to the work and lives of such professionals, which is lacking where professionals focus exclusively on expertise and the pursuit of material satisfaction.⁷⁴ Thus, civic professionalism provides an alternative to the harms created by a narrow, technical professionalism.

III. SULLIVAN'S TREATMENT OF LEGAL PROFESSIONALISM

As mentioned earlier, Sullivan's focus is on the professions generally, rather than on the legal profession per se. Indeed, there are only a few instances within the book where Sullivan pays detailed attention to the legal profession. However, three of these instances warrant further discussion here. The first involves Sullivan's depiction of former Supreme Court Justice Louis Brandeis as an example of the Progressive Era's vision of professionalism that Sullivan presents as the closest example in American history to the type of civic professionalism he espouses.⁷⁵ The second involves Sullivan's critique of legal education,⁷⁶ which takes place as part of Sullivan's broader critique of professional education and its failure to foster the type of civic professionalism he advocates.⁷⁷ And the third relates to Sullivan's discussion of the central character in Louis Auchincloss's novel *Diary of a Yuppie*, a lawyer who falls victim to the lures of technical professionalism.⁷⁸

⁶⁹ SULLIVAN, *supra* note 10, at 23, 176.

⁷⁰ *Id.* at 22-23.

⁷¹ *Id.* at 21-22.

⁷² *Id.*

⁷³ *Id.* at 181-82.

⁷⁴ *Id.* at 169-70.

⁷⁵ *Id.* at 101-05.

⁷⁶ *Id.* at 210-16.

⁷⁷ *Id.* at 195-26.

⁷⁸ *Id.* at 167-70.

As mentioned above, Sullivan holds up the Progressive Era as the period within American history in which the values of civic professionalism were most clearly advanced.⁷⁹ One historical figure that Sullivan focuses on as representing some of those values is Louis Brandeis.⁸⁰ However, rather than presenting Brandeis as an unequivocal advocate of civic professionalism, Sullivan presents Brandeis as himself embodying the general division between technical and civic professionalism.⁸¹ On the one hand, Sullivan presents Brandeis's argument in the famous ICC rate case of 1910-11,⁸² as an example of the lawyer's technical side.⁸³ Sullivan contends that Brandeis's reliance on social science principles in his case brief was indicative of a belief in the capacity of expert knowledge to triumph over the challenges of the day.⁸⁴ Indeed, Sullivan contends that it was Brandeis's advocacy in the case that first brought public awareness to Taylorite principles of scientific management.⁸⁵

On the other hand, according to Sullivan, Brandeis also saw important implications for the broader public interest in his representation of individual clients. Sullivan contends that Brandeis's conceived role of "lawyer for the situation" expressly embraced the idea that a lawyer must include a concern for the kind of public spiritedness identified above in seeking to advance the ends of particular clients.⁸⁶ Sullivan is also drawn to Brandeis's focus on the importance of judgment to the lawyer's need to balance both the private and public interests implicated in the resolution of legal disputes.⁸⁷ Indeed, Sullivan draws a connection between Brandeis's conception of judgment and the Aristotelian concept of practical reasoning, or *phronesis*, which is important to the type of civic professionalism Sullivan espouses.⁸⁸ In other places throughout the book,

⁷⁹ See *supra* notes 52-53 and accompanying text.

⁸⁰ See SULLIVAN, *supra* note 10, at 101-05.

⁸¹ *Id.* at 101.

⁸² Sullivan describes the case as involving a "battle over whether the economically pivotal northeastern railroads should be granted a freight increase against the united opposition of shippers and consumer interests" *Id.* at 102.

⁸³ *Id.*

⁸⁴ *Id.* The brief is reprinted in LOUIS D. BRANDEIS, *SCIENTIFIC MANAGEMENT AND THE RAILROADS* (1911). However, it was Brandeis's reliance on social science data in a brief for a different case, *Mueller v. Oregon*, 208 U.S. 412 (1908), for which he is better known. See, e.g., Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 199 & n.12 (2000).

⁸⁵ SULLIVAN, *supra* note 10, at 102. See also Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1408 (1993).

⁸⁶ SULLIVAN, *supra* note 10, at 104.

⁸⁷ *Id.*

⁸⁸ *Id.* Anthony Kronman also relies heavily on the concept of *phronesis* in his prescription for lawyer professionalism. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

Sullivan similarly relies on related traditions within pragmatic philosophy,⁸⁹ and virtue ethics,⁹⁰ in developing his vision of civic professionalism.

However, Brandeis presents a less than perfect example of the type of civic professionalism that Sullivan espouses, even if one ignores the dual sides to his persona that Sullivan points out. That is because, even in situations where Brandeis was expressly representing “the public interest,”⁹¹ he seldom if ever showed any appetite for or commitment to the type of “deep democratic” principles that Sullivan seeks to advance.⁹² Thus, in his extensive and thoughtful appraisal of Brandeis, Professor Clyde Spillinger points out that the vision of the public interest advanced by Brandeis in the context of a particular dispute was almost always the product of Brandeis’s solitary thought processes.⁹³ Brandeis had little desire to seek input from, or dialogue with interested parties in formulating his position with regard to particular matters.⁹⁴ Spillinger points out that this approach was not only taken by Brandeis in his legal engagements, but also represented by Brandeis’s almost fanatical unwillingness to forfeit his perceived (and actual) independence by affiliating with particular political parties or movements,⁹⁵ as well as his reluctance to engage in many significant personal relationships.⁹⁶

⁸⁹ SULLIVAN, *supra* note 10, at 179-85, 242-46. The term pragmatic philosophy is used to describe the work of a group of late Nineteenth Century American thinkers including Charles Sanders Peirce, William James, John Dewey, and Oliver Wendell Holmes. See Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 403 (2004). Though the views within this group are diverse and defy easy description, they share themes of anti-foundationalism, contextualism, and instrumentalism. *Id.* at 403-04. Sullivan seems particularly drawn to the work of Dewey, who he cites to frequently throughout *Work and Integrity*.

⁹⁰ SULLIVAN, *supra* note 10, at 262-67. The term virtue ethics also defies easy description. See, e.g., David Thunder, *Can a Good Person Be a Lawyer?*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 313, 324 (2006). However, virtue ethics focuses on virtues or dispositions that constitute all-around good human character, rather than on rule-based or consequentialist accounts of moral rightness. *Id.* at 325.

⁹¹ Brandeis had what now seems to be an uncanny ability to enter into public controversies in his capacity as a lawyer without representing a particular party to the controversy. See generally Clyde Spillinger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L. J. 1445 (1996). Indeed, it is to describe such representations that Brandeis coined the phrase “counsel for the situation.” *Id.* at 1502. Nonetheless, Spillinger is critical of the tensions, if not outright conflicts, that sometimes arose between Brandeis’s representation of particular clients, and his advocacy for the public interest in certain matters. See *id.* at 1487-98.

⁹² The phrase “deep democracy” here is taken from CORNELL WEST, *DEMOCRACY MATTERS* (2004), and is meant to refer to a “ground-up” sort of democracy where ideas rise up from the broader populace, as opposed to a “top-down” sort of democracy where ideas are imposed from above by persons in positions of authority.

⁹³ Spillinger, *supra* note 91, at 1467-69, 1526-27.

⁹⁴ *Id.* at 1526-27.

⁹⁵ *Id.* at 1451.

⁹⁶ *Id.* at 1531 & n.294, 1535.

Brandeis's stance as a solitary crusader for the public interest led Professor David Luban to characterize Brandeis's approach as following from the "noblesse oblige tradition."⁹⁷ Luban points out that Brandeis's vision of the public interest in a particular dispute almost always ended up focusing on preserving social harmony (and thus the capitalist system) rather than on uplifting the situation of the masses in America.⁹⁸ Thus, Brandeis seemed to have little interest in advancing democracy per se. This lies in stark contrast to the version of civic professionalism Sullivan advances and the communitarian perspective from which he writes.

A second area particularly relating to the legal profession that Sullivan examines is a critique of legal education. Indeed, education is a major focus of Sullivan's book generally. Sullivan sees reform of professional education as a necessary precursor to reconceiving professionalism generally.⁹⁹ Sullivan also spends time looking at educators themselves as professionals. In regard to graduate education overall, Sullivan speaks of educating future professionals in terms of apprenticeship.¹⁰⁰ Historically, professional education took place in the setting of traditional, face to face apprenticeships, where an experienced practitioner in the field transmitted professional knowledge directly to the novice practitioner through collaborative work on professional projects.¹⁰¹ Though the locus of professional training has largely moved from the workplace to the professional school, Sullivan nonetheless sees the apprenticeship as a particularly useful lens through which to view professional education, due to the effectiveness of apprenticeships in transmitting professional values in addition to professional skills.¹⁰²

In fact, Sullivan breaks down professional education into three separate apprenticeships. The first of these, he describes as the intellectual or the cognitive apprenticeship.¹⁰³ This apprenticeship relates to learning the body of expert knowledge deemed necessary to practice adequately in the profession.¹⁰⁴ The second apprenticeship relates to developing the practice skills necessary to success in a particular professional field.¹⁰⁵ And the third and final apprenticeship involves learning the values and attitudes shared by members of the relevant professional community.¹⁰⁶

⁹⁷ David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 717 (1988).

⁹⁸ *Id.* at 722.

⁹⁹ SULLIVAN, *supra* note 10, at 195-96.

¹⁰⁰ *Id.* at 205.

¹⁰¹ *Id.*

¹⁰² *Id.* at 205-06.

¹⁰³ *Id.* at 208.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Not surprisingly, Sullivan concludes that while American law schools have done a fairly good job in training law students with regard to the first apprenticeship, they have been far less successful in educating students effectively with regard to the second and third apprenticeships.¹⁰⁷ With regard to the intellectual apprenticeship, Sullivan contends that the case method, and the Socratic approach that is primarily used to teach it, have been fairly effective means of conveying knowledge of legal doctrine to law students.¹⁰⁸ On the other hand, Sullivan decries the relative paucity of skills and clinical training in law schools in comparison to traditional doctrinal courses.¹⁰⁹ He also decries the lower prestige accorded to clinical faculty and courses in the law school.¹¹⁰ Finally, Sullivan further criticizes law schools for doing a poor job of teaching ethics and professional values to law students.¹¹¹ He attributes part of this to the failings of the case method in both contextualizing legal problems, as well as in acknowledging the social justice and ethical aspects of legal decisions.¹¹² Indeed, given Sullivan's focus on the concept of *phronesis* as being central to professionalism,¹¹³ it is not surprising that he finds the failure of legal education to situate learning more directly in the context of the problems faced by legal practitioners and their clients, whether by additional clinical or skills training, as resulting in a failure to develop in students the habits of mind and judgment necessary to practice as ethical lawyers in the future.

As a clinical law teacher myself, as well as someone who has taught legal research, writing, and other lawyering skills extensively, it is hard for me to take issue with Sullivan's criticisms of legal education for failing to pay adequate attention to skills training, or with those relating to the relative status of those teachers who engage in such training of students. In fact, I have long advocated for additional focus on clinical and skills training in legal education.¹¹⁴ On the other hand, I do believe that Sullivan has underestimated the expansion of clinical and skills training in law schools over the past couple of decades.¹¹⁵

¹⁰⁷ *Id.* at 210.

¹⁰⁸ *Id.* at 210-12.

¹⁰⁹ *Id.* at 213.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 214.

¹¹² *Id.* at 212.

¹¹³ See *supra* note 88 and accompanying text.

¹¹⁴ See, e.g., Steven K. Berenson, *Can We Talk?: Impediments to Intergenerational Communication and Practice in Law School Elder Law Clinics*, 6 ELDER L. J. 185 (1998); Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Challenge Presented by Self-Represented Litigants in Family Court*, 32 RUTGERS L. J. 105 (2001).

¹¹⁵ See, e.g., Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1, 7-10 (2000) (stating that the greatest growth in law school faculty hiring in recent decades has been in the areas of clinical teaching and legal writing); Gary A. Munneke, *Legal Skills for a Transforming Profession*, 22 PACE L. REV. 105, 120 & n.111 (2000) (noting growth in clinical legal education). However, it does not appear that increases in status for clinical and legal writing teachers have kept pace with the growth in their

Although I agree that much more needs to be done, the glass in this regard may be fuller than Sullivan acknowledges.

Additionally, while Sullivan briefly addresses issues relating to the financing of legal education, he fails to acknowledge the barrier that such financial issues pose to further increasing clinical and skills training in law schools. Sullivan also ignores the fundamental role played by the legal profession's admission standards in shaping the content of American legal education. With regard to the former, Sullivan correctly points out that the high student-faculty ratios in traditional law school classes have been a financial boon to law schools.¹¹⁶ But even given the persistence of such classes as the central focus of legal education, the cost of American legal education has been skyrocketing for years, and many law students are left with untenable levels of debt upon graduation.¹¹⁷ Yet advocates such as Sullivan and myself must acknowledge the higher costs associated with clinical and skills training in comparison to more traditional approaches to legal education.¹¹⁸ Passing such costs along to students and further increasing graduating law student debt loads is not a viable option for addressing the additional costs that would be associated with increased clinical and skills training in law schools. According to Sullivan's description of professionalism, increasing the financial pressures on new lawyers will only further enhance the forces driving lawyers in the direction of technical professionalism, as opposed to the type of civic professionalism Sullivan advocates. Without addressing the question of how it will be financed, the suggestion of increasing clinical and skills training in law school may be purely academic.

Sullivan also fails to address the fact that a fundamental criterion for entry into the legal profession, passage of the bar exam, still focuses largely on the type of doctrinal knowledge, or first apprenticeship learning, that Sullivan acknowledges is well served by traditional legal education.¹¹⁹ For the most part,

numbers. See Angel, *supra*, at 7-10. See generally Jo Anne Durako, *Dismantling Hierarchies: Occupation Segregation of Legal Writing Faculties: Separate and Unequal*, 73 UMKC L. REV. 253 (2004); Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 U.M.K.C. L. REV. 419 (2004); Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313 (2000); Jo Anne Durako, *Second Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 552 (2000).

¹¹⁶ SULLIVAN, *supra* note 10, at 210.

¹¹⁷ See, e.g., ABA Commission on Loan Repayment and Forgiveness, *Lifting the Burden: Law Student Debt as a Barrier to Public Service* 16 (2003), available at <http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf>. See also MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 90 (1996).

¹¹⁸ See, e.g., John J. Costonis, *The McCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 190 (1993). But see Margaret Martin Barry, John C. Dubin & Peter A. Joy, *Clinical Legal Education for this Millenium: The Third Wave*, 7 CLINICAL L. REV. 1, 19 (2000) (discussing creative solutions to the "problem" of funding expanded clinical legal education).

¹¹⁹ See generally Andrea A. Curcio, *A Better Bar: How and Why the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002) (contending that while bar exams adequately measure

the essay and multiple choice questions that still dominate bar testing focus on the type of doctrinal knowledge and legal analytic skills that Sullivan contends are well taught in the traditional law school classroom setting. Although the move to include performance tests on bar exams may represent a countervailing trend,¹²⁰ it is still the case that many of the legal practice skills Sullivan suggests should be emphasized in the law school curriculum, such as client interviewing and counseling, negotiation, and trial advocacy skills, are in no way examined prior to entry into the profession.¹²¹

It is true that practicing attorneys often like to grumble about the practical and practice-oriented skills and knowledge that they wish they learned, but did not in fact learn in law school.¹²² And it is also the case that given changes in law firm economics, firms do a lot less practical training of new attorneys than they did in the past.¹²³ Additionally, continuing legal education programs for attorneys often replicate the doctrinal focus of graduate legal education, given that practicing attorneys are rarely willing to devote the time and money that would be required to do effective skills training for already admitted attorneys.¹²⁴ Recent changes in ABA law school accreditation standards requiring skills training and actual practice opportunities represent steps in the right direction in terms of the profession demanding a broader range of skills and clinical training on the part of legal educators.¹²⁵ However, unless and until the profession is willing to move bar testing significantly in the direction of focusing on practice skills and values, it seems likely that law schools will feel pressure to

knowledge of legal doctrine, they fail to measure the broad range of skills necessary to successful legal practice).

¹²⁰ See Barbara A. Anscher, *Turning Novices into Experts: Honing Skills for the Performance Test*, 24 HAMLINE L. REV. 224, 225 (2001). But cf. Curcio, *supra* note 119, at 378 (questioning whether performance tests differ significantly from traditional essay tests in terms of the skills they measure).

¹²¹ Curcio, *supra* note 119, at 364-65. See also Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 928 (1997); Kristin Booth Glen, *Thinking Outside of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 375 (2003).

¹²² See, e.g., Joanne Martin & Bryant G. Garth, *Clinical Education as a Bridge Between Law School and Practice: Mitigating the Misery*, 1 CLINICAL L. REV. 443, 443 (1994) (quoting lawyer complaints).

¹²³ See, e.g., GLENDON, *supra* note 117, at 27-28; Patrick J. Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 927 & n.297 (1999).

¹²⁴ See generally Harry J. Hyanesworth, *Post Graduate Legal Education in the United States*, 43 S. TEX. L. REV. 403 (2002).

¹²⁵ In 2005, the ABA House of Delegates approved changes to its Standards for Approval of Law Schools, requiring that students receive: 1) substantial instruction in "other professional skills generally regarded as necessary for effective and responsible participation in the legal profession" (Standard 302(a)(4)); and 2) substantial opportunities for "live-client or other real life practice experiences" (Standard 302(b)(1)). See ABA Section on Legal Education and Admission to the Bar, Chapter 3: Program of Legal Education, available at <http://www.abanet.org/legaled/standards/chapter3.html> (last visited October 5, 2006).

continue presenting the type of doctrinal knowledge and legal analysis skills that are viewed as being necessary to their graduates' successful entry into the profession.¹²⁶

Sullivan's final, extended look at the legal profession comes in the form of his discussion of the character of Robert Service from Louis Auchincloss's novel *Diary of a Yuppie*.¹²⁷ Service is an attorney in a large, corporate law firm, practicing "in the go-go financial scene of New York in the late 1980s."¹²⁸ Service represents Sullivan's technical professionalism taken to an extreme. He is a purely instrumental lawyer whose only concerns are getting the job done, and the corresponding material rewards that will inure to his benefit as a result.¹²⁹ Service's legal practice is unconstrained by any sense of moral or ethical limits, or any concern for the broader consequences of his actions.¹³⁰ His purely instrumental perspective carries over to his personal, as well as his professional life.¹³¹ The results are a failed marriage and other intra-family strains.

Sullivan offers Service as an example of his position that a narrow, technical approach to practice can be unsatisfying on both a professional and spiritual level to those who take such a path. He offers the civic professional alternative as a means to both professional and personal fulfillment for those who choose the latter path. As will be discussed in greater detail in Part IV, there is ample evidence that many attorneys whose careers approximate those of Service have indeed paid a high price.¹³² However, it also remains to be discussed what an actual civic professional alternative practice would look like for an attorney in terms of its day to day activities and practices.

IV. LEGAL PROFESSIONALISM AND INTEGRITY

Given the prominence of the term integrity in the title of Sullivan's book, it is surprising that the first extended discussion of the concept does not occur until the book's final chapter.¹³³ Moreover, Sullivan does not provide a direct definition of what the term integrity means in conjunction with his analysis of professionalism. Nonetheless, it is apparent that Sullivan's understanding of the term highlights its etymological connection to the term integration, with the latter term meaning some sort of "wholeness."¹³⁴ Sullivan seems to believe

¹²⁶ See, e.g., Curcio, *supra* note 119, at 367; GLEN, *supra* note 121, at 359; Howarth, *supra* note 121, at 929.

¹²⁷ See *supra* note 78.

¹²⁸ *Id.* at 167.

¹²⁹ *Id.* at 168.

¹³⁰ *Id.*

¹³¹ *Id.* at 169.

¹³² See *infra* note 194 and accompanying text.

¹³³ SULLIVAN, *supra* note 10, at 283.

¹³⁴ *Id.* at 284.

that integrity requires some sort of correspondence between a person's objectives in both their professional and their personal lives.¹³⁵ As has been discussed above, Sullivan further contends that satisfaction in one's personal life requires some measure of concern for, and connectedness to others, rather than merely a solitary pursuit of individual material satisfaction.¹³⁶ Therefore, a corresponding focus on public interest or other regarding concerns is required in professional life as well as in one's personal life in order to achieve integrity.¹³⁷ The civic professionalism espoused by Sullivan is the means necessary to achieve such a focus in one's professional life.¹³⁸

Recently, a number of legal scholars have similarly focused on the concept of integrity as it relates to the subject of legal ethics or lawyer professional responsibility.¹³⁹ Indeed the *Fordham Law Review* recently devoted an entire symposium to the concept of "integrity in the law."¹⁴⁰ Though the pieces included in the symposium are divided into three categories, "integrity in the practice of law," "the integrity of law," and "integrity in government,"¹⁴¹ it is the pieces falling within the first category that are of concern for purposes of this essay. In addition to the topical relationship, the list of authors of the pieces in the "integrity in the practice of law" section of the symposium reads like a "who's who" in the field of legal ethics scholarship.¹⁴² Yet despite the authors' collective credentials and accomplishments, the overwhelming conclusion to emerge from the pieces taken together is that integrity is at least a problematic, and perhaps even an inadequate concept in which to ground a theory of legal professionalism.

One strain that the symposium authors seem to have in common is that they view integrity in terms of a correspondence between a person's beliefs and a person's actions, rather than in terms of a correspondence between a person's actions in different spheres of their lives, as is Sullivan's focus. In any event, the difficulty of achieving a genuine correspondence between thought and deed

¹³⁵ *Id.* at 283-85.

¹³⁶ *See supra* notes 66-74 and accompanying text. *See also* SULLIVAN, *supra* note 10, at 284.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See, e.g.,* Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629 (2002); Serena Steir, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991).

¹⁴⁰ *See* Symposium, *Integrity in the Law: In Honor of John D. Feerick*, 72 FORDHAM L. REV. 251 (2003).

¹⁴¹ *Id.* at 258-59.

¹⁴² *See* Mary C. Daly, *Teaching Integrity in the Professional Responsibility Curriculum: A Modest Proposal for Change*, 72 FORDHAM L. REV. 261 (2003) [hereinafter Daly, *Teaching Integrity*]; David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279 (2003) [hereinafter Luban, *Integrity*]; Burnele V. Powell, *The Limits of Integrity or Why Cabinets Have Locks*, 72 FORDHAM L. REV. 311 (2003) [hereinafter Powell, *Cabinets*]; Deborah L. Rhode, *If Integrity is the Answer, What is the Question?*, 72 FORDHAM L. REV. 333 (2003) [hereinafter Rhode, *Integrity*].

is, for the symposium authors, a major stumbling block to achieving a satisfactory theory of legal ethics based on the concept of integrity. For example, in his symposium piece, David Luban presents decades worth of research in the field of social psychology which powerfully demonstrates that where people confront a conflict between their beliefs and their actions, the overwhelming tendency is to adjust one's beliefs to better correspond to one's actions (what Luban describes as "low road integrity"), rather than the opposite, conforming actions to fit pre-existing beliefs (what Luban describes as "high road integrity").¹⁴³ But not only does social psychology theory generally, and cognitive dissonance theory particularly suggest that people will bend their beliefs to correspond to their actions, but also that people are unlikely even to be aware that this is what they are doing.¹⁴⁴ This makes it difficult, if not impossible, for people to be on guard for, and take steps to prevent, taking the low road. Luban does offer some strategies that may be helpful to lawyers in trying to avoid low road integrity in the face of law practice pressures to conform their principles to the pull of expedience.¹⁴⁵ However, Luban seems pessimistic that these strategies will be adequate to combat the powerful psychological forces at play.

Burnelle Powell is similarly skeptical of individuals' abilities to act effectively as arbiters of their own integrity in terms of assuring consistency between their actions and their fundamental beliefs. To illustrate this point, Powell relates three stories in which the participants act in a manner that not only would others describe to be wrongful, but that the actors themselves would almost certainly acknowledge ran counter to their own principles and beliefs. The first of these stories involved seminarians who failed to give assistance to a person obviously in need when the seminarians were on their way to deliver a lecture.¹⁴⁶ The second involved a journalist who fabricated large numbers of sources.¹⁴⁷ The third involved anesthesiologists who illegally abused the very

¹⁴³ Luban, *Integrity*, *supra* note 142, at 279-80.

¹⁴⁴ *Id.* at 299-300.

¹⁴⁵ *Id.* at 307. These strategies include: pre-commitment to certain ethical "lines in the sand" that one will not cross, even where at the time crossing them seems appropriate, *id.*; awareness of ascribing blame to someone else, *id.* at 308; and what Luban describes as "Socratic skepticism." *Id.* at 309.

¹⁴⁶ Powell, *Cabinets*, *supra* note 142, at 324. This "story" is actually based on the well-known study by psychologists John Darley and Daniel Batson, in which seminary students were confronted with a situation based upon the biblical story of the Good Samaritan. *Id.* Darley and Batson found that the variable that most greatly influenced whether students stopped to help the person in distress did not relate to the students' reasons for studying theology, nor the theme of their upcoming lectures, some of which were based directly on the Good Samaritan parable. *Id.* Rather, the determinative factor seemed to be whether the students were told that they were early or late for the talk they were to deliver. *Id.* at 328. Powell describes the study as illustrating the psychological concept known as the Fundamental Attribution Error (FAE), or the mistaken belief that behavior is more influenced by the character of the actor than situational or contextual factors. *Id.* at 324 & n.57, 329. Powell would likely describe the very notion of grounding a conception of attorney professionalism in the concept of integrity as an example of the FAE.

¹⁴⁷ *Id.* at 326.

medications they prescribed for their patients.¹⁴⁸ In each instance, Powell points out that the actors were almost certainly aware of the wrongfulness of their conduct.¹⁴⁹ Powell uses the metaphor of cabinet locks to suggest the need for external safeguards to provide contextual brakes against individuals' tendencies to depart from acting in a manner they know to be proper.¹⁵⁰ Applying these views to the realm of legal ethics, Powell calls for more robust enforcement of attorney professional responsibility rules, and suggests a number of ways to accomplish such a change.¹⁵¹

As Deborah Rhode points out in her contribution to the symposium, even where individuals are able to maintain a strict correspondence between their actions and their fundamental beliefs, the results of such exercises of integrity are not necessarily salutary.¹⁵² After all, fanatics can be steadfast in holding to their beliefs. However, we do not find that type of integrity to be praiseworthy.¹⁵³ Thus, Rhode acknowledges that in order for the concept of integrity to have value as a basis for developing a conception of the proper professional role for lawyers, that concept of integrity must involve some criteria for evaluating the underlying values that a lawyer of integrity adheres to.¹⁵⁴

The problem raised by this need to focus on underlying values is that even within a professional group such as lawyers, the fact of moral or ethical pluralism is likely to prevent an absolute, or perhaps even a general consensus as to the proper underlying values a lawyer of integrity should adhere to.¹⁵⁵ Rhode does not suggest that a single set of underlying values could be agreed upon by all that would ground a conception of lawyer professionalism based on integrity. However, acknowledging the fact of ethical pluralism, Rhode suggests that the values underlying a conception of attorney professionalism based

¹⁴⁸ *Id.* at 327.

¹⁴⁹ *Id.* at 329.

¹⁵⁰ *Id.* at 330.

¹⁵¹ *Id.* at 331-32. The following are among the specific suggestions that Powell offers: 1) requiring lawyers to join legal practices groups, each with a senior attorney, an ethicist, and reporting obligations; 2) law firm discipline; 3) joint liability for all lawyers for losses resulting from lawyer theft from clients; 4) sabbatical reviews for law firms; and 5) reality-based mandatory continuing legal education programs, including exercises such as unannounced visits from mock clients presenting issues that pose ethical dilemmas. *Id.*

¹⁵² Rhode, *Integrity*, *supra* note 142, at 335.

¹⁵³ *Id.* at 335-36.

¹⁵⁴ *Id.* at 336. Sharon Dolovich goes into even greater depth in exploring whether the concept of integrity is consistent with any underlying set of values or requires a particular set of underlying values. Dolovich, *supra* note 139, at 1654-56.

¹⁵⁵ See generally Steven K. Berenson, *What Should Law School Conduct Codes Do?*, 38 AKRON L. REV. 803, 827 (2005); Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 25, 35-36 (2000); Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005); Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 827 (1998).

on integrity would at a minimum need to “reflect some reasoned deliberation, based on logical assessment of relevant evidence and competing views.”¹⁵⁶ She points out that “[s]ome theorists would add a requirement that the values themselves satisfy certain minimum demands of consistency, generalizability, and respect for others.”¹⁵⁷

Mary Daly, in her symposium submission, makes a similar effort to develop a minimal set of criteria for evaluating the values that would underlie a proper conception of integrity for the purpose of using such a conception to ground a broader theory of attorney professionalism. Daly draws her criteria from reviewing a list of names of persons of integrity provided to her by the symposium’s honoree, former Fordham University Law School Dean John D. Feerick.¹⁵⁸ Daly’s criteria include the following: integrity is a virtue exercised over a lifetime; integrity is exercised within a community, rather than in isolation; integrity is an institutional virtue as well as a personal one; and integrity is associated with the common good.¹⁵⁹ Here, the correspondence between Daly’s criteria and many of the important values associated with professionalism by Sullivan should be obvious.¹⁶⁰

Nonetheless, the high level of generality of the underlying criteria necessary to a conception of integrity that can support a broader conception of attorney professionalism identified by Rhode and Daly points out just how much more work needs to be done to develop a full-blown conception of attorney professionalism based on the concept of integrity. Indeed, the same can be said of the even broader conception of professionalism based on integrity advanced by Sullivan. Moreover, given the problems identified by Luban and Powell in relying on the concept of integrity as a basis for a conception of professionalism, one must be sanguine about the prospects for a truly workable conception of professionalism based on integrity emerging in the near future.

V. SULLIVAN’S WORK AND LEGAL ETHICS SCHOLARSHIP

Even though it only makes a modest start toward developing a full-blown theory of professionalism based on the concept of integrity, Sullivan’s book nonetheless has much to offer to students of contemporary scholarship on legal ethics and appropriate lawyer professional roles and responsibilities. From this writer’s view, perhaps the greatest strength to be offered by Sullivan’s book to such readers is the framework that Sullivan’s categories of technical and civic professionalism can provide for both categorizing existing scholarship in the

¹⁵⁶ Rhode, *Integrity*, *supra* note 142, at 336.

¹⁵⁷ *Id.* at 336 & n.12 (citations omitted).

¹⁵⁸ Daly, *Teaching Integrity*, *supra* note 142, at 262, 264.

¹⁵⁹ *Id.* at 263, 266.

¹⁶⁰ For example, with regard to the importance of community, see *supra* notes 73-74 and accompanying text; with regard to common good, see *supra* note 29 and accompanying text; and with regard to the importance of institutions, see *infra* notes 238-42 and accompanying text.

field, as well as pointing out gaps in the existing scholarship that may show the way toward future paths worth pursuing. However, in order to provide a more detailed map of the field of contemporary legal ethics scholarship, I intend to subdivide Sullivan's categories. Thus, the following discussion will address contemporary legal professionalism scholarship in terms of the categories of market technical professionalism, craft technical professionalism, individual civic professionalism, and collective civic professionalism.

A. *Market Technical Professionalism*

In the market form of technical professionalism, individual professionals use their scarce expert knowledge to enhance their own market power and the material gains they can reap from sale of such expertise. Of course, the most vivid example of lawyer market technical professionalism in Sullivan's book is his description of attorney Robert Service from Louis Auchincloss' *Diary of a Yuppie*.¹⁶¹ However, another example of market technical professionalism that Sullivan addresses is the efforts of professionals to reap the financial windfalls available to them during the era of "corporation capitalism" around the turn of the Twentieth century.¹⁶²

In the field of legal ethics scholarship, the scholar most closely associated with a version of market technical professionalism is Fordham Law School Professor Russell Pearce. In a widely-cited and highly influential 1995 article,¹⁶³ Pearce describes the "professional" approach to lawyer regulation, a version of the professionalism model attributed to Sullivan above,¹⁶⁴ in terms of the concept of a "paradigm" advanced by philosopher of science Thomas Kuhn.¹⁶⁵ Pearce argues that as a descriptive matter, the professional paradigm for lawyer regulation is in the process of being replaced by a new paradigm, one that he describes as the "law practice as a business paradigm," or "business paradigm."¹⁶⁶ Pearce further argues that as a normative matter, the replacement of the professional paradigm with the business paradigm will "improve the quality

¹⁶¹ See *supra* notes 127-31 and accompanying text.

¹⁶² See *supra* notes 46-51 and accompanying text.

¹⁶³ Pearce, *Professional Paradigm*, *supra* note 23, at 1229.

¹⁶⁴ See *supra* note 23 and accompanying text. Indeed, the characteristics that Pearce attributes to lawyer professionalism, esoteric knowledge, altruism, and autonomy, see Pearce, *Professional Paradigm*, *supra* note 23, at 1238, are virtually identical to the factors associated with professionalism generally identified by Sullivan.

¹⁶⁵ According to Pearce's description of the theory advanced in Kuhn's groundbreaking work *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1971), a paradigm is a common approach to solving problems shared among the practitioners in a scientific community. Pearce, *Professional Paradigm*, *supra* note 23, at 1233-37. Eventually, problems arise that are not susceptible to solution according to the approaches of the then-current paradigm. *Id.* The result is that a new paradigm replaces the old one – a new approach that is capable of solving the problems that were not susceptible to resolution under the former paradigm. *Id.*

¹⁶⁶ *Id.* at 1265.

of legal services, the administration of justice, and the contribution of lawyers to the public good.”¹⁶⁷ For reasons discussed below, Pearce is mistaken as to both his descriptive and his normative conclusions.

However, it first should be mentioned that despite embracing the rhetoric of market technical professionalism,¹⁶⁸ at the end of the day, Pearce advocates for something significantly less distinct from the current regime of lawyer professionalism than the name of his law practice as a business paradigm would suggest.¹⁶⁹ Under a pure version of market technical professionalism, lawyer regulation would be scrapped in favor of a market approach to legal ethics. And though Pearce’s rhetoric in terms of the business paradigm suggests the same, in the end, Pearce advocates for what he describes as a “Middle Range” approach to lawyer regulation.¹⁷⁰ The Middle Range approach rejects anti-market restrictions such as bans on non-lawyer legal practice and limitations on financing litigation.¹⁷¹ However, the Middle Range approach would continue in effect most regulations pertaining to the lawyer-client relationship, such as those relating to confidentiality, some conflicts of interest, and control of legal representation, while shifting enforcement authority for such regulations from the profession itself to the state.¹⁷² Given the less than comprehensive changes Pearce actually suggests to the current regime of lawyer regulation, his proposal might be better described as “professionalism lite,” although that would lack the cache of the law practice as a business rhetoric opted for by Pearce.

In fact, it is Pearce’s “profit maximizer,” which most closely resembles the type of pure market technical professional that I have in mind here.¹⁷³ Pearce presents the profit maximizer as a problem that cannot adequately be solved by the current professional paradigm. According to Pearce, “the profit maximizer behaves as if legal services are a commodity like any other[,] . . . seeks as much money as possible from the client[,] and disregards obligations to the public.”¹⁷⁴ Though the profit maximizer has been a primary target of the defenders of the professional paradigm,¹⁷⁵ Pearce contends that the professional model’s tools are inadequate to deal with the challenge presented by the profit

¹⁶⁷ *Id.* at 1232.

¹⁶⁸ Indeed, in two subsequent articles, Pearce continues his call for a move toward his business paradigm. See Russell G. Pearce, *Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll*, 14 WIDENER L.J. 907 (2005); Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-As-Business Paradigm*, 27 FLA. ST. U. L. REV. 9 (1999) [hereinafter Pearce, *Post-Professionalism*].

¹⁶⁹ Pearce, *Professional Paradigm*, *supra* note 23, at 1272.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1272-73.

¹⁷² *Id.* at 1273.

¹⁷³ *Id.* at 1242.

¹⁷⁴ *Id.* at 1242-43.

¹⁷⁵ See, e.g., *id.* at 1254-56.

maximizer and therefore calls for the replacement of the paradigm with the law practice as a business paradigm.¹⁷⁶

Pearce's embrace of business values, where the pursuit of profits have long reigned supreme,¹⁷⁷ seems at least an ironic solution to offer to the problem of excessive profit seeking by lawyers. Additionally, we are in a period in which strong questions have been raised about the efficacy of ethics in current business practice.¹⁷⁸ In a long and thorough critique of Pearce's law practice as a business paradigm, law professor Jeffrey Stempel argues that Pearce has overstated the professional paradigm's difficulties in responding to the problems presented by the profit maximizer and other challenges to its legitimacy.¹⁷⁹ I will not repeat, though I agree with much of Stempel's critique. What seems worth mentioning here, however, is how little of an affirmative case Pearce makes for the business paradigm he advocates, beyond the critique he offers of the professional paradigm. In fact, as has been noted elsewhere, Pearce make virtually no mention of business ethics in his article.¹⁸⁰

As suggested above, a cynic might contend that there is no such thing as business ethics or at the very least that they have been in hibernation in recent years, and that the bottom line is all that matters in the business world. A less cynical approach is offered by Professor Rob Atkinson, who, in light of the recent spate of corporate scandals, undertook a comparative study of business and legal ethics.¹⁸¹ Though the details of Atkinson's study are beyond the scope of the present essay, it is worth noting that Atkinson identifies three, largely overlapping schools of thought that currently define the fields of business and legal ethics.¹⁸² The important point for present purposes is that given the similarities

¹⁷⁶ *Id.* at 1263.

¹⁷⁷ See, e.g., Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 85-86 (1999).

¹⁷⁸ See, e.g., Deborah L. Rhode & Paul D. Paton, *Enron: Lessons and Implications: Lawyers, Ethics and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 10 (2002) (discussing increased focus on business ethics in wake of Enron scandal); see also Stempel, *supra* note 177, at 66 (arguing that the business community lacks a consistent system for teaching and enforcing ethical behavior).

¹⁷⁹ Rhode, *Enron* at 25.

¹⁸⁰ Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 J. CORP. L. 469, 484 (2004).

¹⁸¹ *Id.* at 469.

¹⁸² Atkinson identifies these schools as: 1) normative neutralism; 2) normative normalism; and 3) normative sectarianism. *Id.* at 486. According to Atkinson, normative neutralists reject the proposition that supplemental norms, beyond those of legality and profit, apply to the conduct of lawyers and business persons. *Id.* Atkinson's category of normative neutralism roughly overlaps with the categories of market and craft technical professionalism identified in this essay. Normative normalists, by contrast, accept the fact that norms external to the legal and business professions apply to persons within the professions. *Id.* at 487. The term chosen comes from both the fact that such application of external norms is viewed as being "normal," as well as the fact that such norms are themselves viewed as being "normal," that is, applying to members of the public as a whole. *Id.* Atkinson's category of normative normalism roughly corresponds to the category

between the corresponding schools within business and legal ethics, it seems unlikely that a shift in focus from a legal, to a business ethics approach, as advocated by Pearce, would have a significant impact on the underlying values to be advanced.

Aside from the normative weaknesses of the case that Pearce makes for the business paradigm, he also seems to have erred in his description of the replacement of the professional paradigm with his business paradigm.¹⁸³ Though it has been more than a decade since Pearce proposed his business paradigm,¹⁸⁴ and though a few years later Pearce predicted that the law as business paradigm would be firmly in place by 2050,¹⁸⁵ the professional paradigm for lawyers remains firmly in place. Although the profession recently undertook its first major overhaul of its primary code of ethics in approximately two decades,¹⁸⁶ two of the primary targets of those who advocate for some sort of market technical professionalism for lawyers, restrictions on both multidisciplinary practice (MDP) and multijurisdictional practice (MJP),¹⁸⁷ underwent nothing of the sort

of individual civic professionalism used in this essay. Finally, Atkinson's category of normative sectarians relates to lawyers and business persons who accept the fact that norms external to the profession apply to them, but reject the application of "normal," that is, generally applicable norms, in favor of norms applicable to certain identifiable groups, such as religious sects. *Id.* The present essay does not address approaches to legal professionalism that are grounded primarily in religious or other sectarian values. Of course, the best known legal scholar who takes such an approach is Thomas Schaefer. See, e.g., Thomas L. Shaffer, *On Religious Legal Ethics*, 35 CATH. LAW. 393 (1994).

¹⁸³ Stempel, *supra* note 177, at 56-57.

¹⁸⁴ Pearce, *Professional Paradigm*, *supra* note 23, at 1229.

¹⁸⁵ Pearce, *Post Professionalism*, *supra* note 168, at 9.

¹⁸⁶ See, e.g., Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002); Symposium, *Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual*, 2003 U. ILL. L. REV. 1173; Symposium, *The Ethics 2000 Commission: The Adversary System and the Lawyer-Client Relationship*, 70 TENN. L. REV. 1 (2002).

¹⁸⁷ Indeed, Pearce specifically cites to developments in the 1990's relating to the profession's rules regulating ancillary business practices as evidence of the professional paradigm's demise. See Pearce, *Professional Paradigm*, *supra* note 23, at 1258-60. For criticism of the model rules' approach to MDP, see generally, John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000); Bradley G. Johnson, *Ready or Not Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices*, 57 WASH. & LEE L. REV. 951 (2000); Michael W. Price, *Comment, A New Millennium's Resolution: The ABA Continues its Regrettable Ban on Multidisciplinary Practice*, 37 HOUS. L. REV. 1495 (2000); Stuart S. Prince, *Comment, The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245 (2000). For criticisms of the model rules' approach to MJP, see generally, Cynthia L. Fountaine, *Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules*, 81 WASH. U. L.Q. 737 (2003); Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission*, 44 ARIZ. L. REV. 685 (2002); Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Administrative Rules for Out-Of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135 (2004); Daniel Pouladin &

of revolutionary change predicted by Pearce.¹⁸⁸ By contrast, some of the furthest reaching changes to emerge from the Ethics 2000 process were the expanded exceptions to attorney confidentiality that were adopted.¹⁸⁹ At least at face value, the latter changes run counter to the business interests of lawyers, as increased confidentiality has economic value to clients.¹⁹⁰ And while a cynical explanation would suggest that such changes were necessary to improve the public perception of the profession in the wake of the most recent round of corporate scandals, an equally plausible explanation comes from the notion that the changes were made in pursuit of the public spiritedness tenet of the professional model.

Both Pearce¹⁹¹ and Sullivan¹⁹² have successfully demonstrated the harm to the public interest that can be caused by the profit maximizer. Though it is not Pearce's focus, Sullivan has also demonstrated the dangers to the spirit and well being of individual lawyers posed by excessive market technical professionalism.¹⁹³ Many writers on the topic of lawyer professionalism have amply supported the latter point.¹⁹⁴ Pearce has failed to make either a normative or a descriptive case that the answer to the profit maximizer lies within the category of market technical professionalism. Therefore, it is time to turn our attention to another of Sullivan's categories.

Leslie Reed, *Comment, "You are Now Free to Move About the Country": Why Bankruptcy Lawyers Should be Free to Engage in Multijurisdictional Practice*, 52 UCLA L. REV. 537 (2005).

¹⁸⁸ With regard to MDP, the ABA left unchanged Model Rule 5.4's bar on lawyers sharing fees, forming partnerships with, or working under the direction of non-lawyers. *Compare* MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983) *with* MODEL RULES OF PROF'L CONDUCT R. 5.4 (2002). *See also* Love, *supra* note 186, at 471. With regard to MJP, though the ABA adopted four "safe harbors," pursuant to which a lawyer not admitted to practice in a particular jurisdiction may nonetheless provide legal services temporarily in such a jurisdiction, the ABA maintained the general requirement of separate admission in each jurisdiction in which an attorney wishes to practice law other than on a temporary and limited basis. *Compare* MODEL RULES OF PROF'L CONDUCT R. 5.5 (1983) *with* MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002). *See also* Love, *supra* note 186, at 472-73.

¹⁸⁹ *See generally*, Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . and its Exceptions . . .*, 81 NEB. L. REV. 1320 (2003); Patrick T. Casey & Richard S. Dennison, *The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society*, 16 GEO. J. LEGAL ETHICS 569 (2003).

¹⁹⁰ *See, e.g.*, Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998).

¹⁹¹ Pearce, *Professional Paradigm*, *supra* note 23, at 1250-56.

¹⁹² *See supra* notes 61-66 and accompanying text.

¹⁹³ *See supra* notes 127-32 and accompanying text.

¹⁹⁴ *See, e.g.*, Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005); Schiltz, *supra* note 123, at 871.

B. *Craft Technical Professionalism*

Craft technical professionalism represents an alternative form of technical professionalism to the type of market technical professionalism discussed above. In craft technical professionalism, as in all forms of technical professionalism, the practitioner's focus is on the specialized knowledge and skills that are uniquely possessed by the members of the professional group. However, unlike market technical professionalism, where the purpose of the professional's focus on such knowledge and skills is the enhancement of the professional's own status and wealth, in craft technical professionalism, the professional's focus on such knowledge and skills is viewed as either an end in itself, or as being necessary to the profession's client service objectives.

Turning back to Sullivan's work, examples of craft technical professionalism can be seen in the American professions' response to industrialization. As was mentioned previously, much of the activity of professionals during the era of corporation capitalism can be described in terms of market technical professionalism.¹⁹⁵ However, Sullivan also discusses the manner in which professional expertise was utilized in this era to help solve many of the new problems that arose from industrialization.¹⁹⁶ Much of this work was supported by the philanthropic foundations of the very "captains of industry" who themselves disproportionately benefited from the unequal flow of the riches resulting from industrialization.¹⁹⁷

Turning to contemporary scholarship regarding the appropriate professional role for lawyers, the two scholars most closely associated with advocating a form of craft technical professionalism for lawyers are Professors Charles Fried and Stephen Pepper. In seminal articles, Fried and Pepper advocate for a strongly client-centered approach to legal practice, in which the lawyer's client service objectives are paramount.¹⁹⁸ The professors offer loyalty¹⁹⁹ and enhancement of client autonomy²⁰⁰ as the primary values to be served by such an approach to proper attorney professional role. More recently, Mary Ann Glendon similarly advocated an approach to lawyer professionalism that focuses on technical expertise, or the "craft" of lawyering.²⁰¹ However, Glendon offers

¹⁹⁵ See *supra* note 162 and accompanying text.

¹⁹⁶ SULLIVAN, *supra* note 10, at 86.

¹⁹⁷ *Id.* at 87.

¹⁹⁸ See Charles Fried, *Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986).

¹⁹⁹ Fried, *supra* note 198, at 1071-76.

²⁰⁰ Pepper, *supra* note 198, at 617.

²⁰¹ See GLENDON, *supra* note 117, at 102-08; Pearce, *Professional Paradigm*, *supra* note 23, at 1270 (describing Glendon's approach as an "ethic of craft"); see also Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235, 1256 (1996) (reviewing Glendon); *Book Note, A Bold Leap Backward?*, 108 HARV. L. REV. 2047 (1995) (same).

her form of craft technical professionalism as a response to the perceived spiritual malaise of contemporary lawyers, though the client service benefits of her approach should be apparent.²⁰²

Much scholarship regarding attorney professional roles and responsibilities in recent decades has been devoted to a critique of the craft technical professionalism approach identified above. Much of this critique has focused on the “neutrality,”²⁰³ or “non-accountability,”²⁰⁴ tenet of craft technical professionalism for lawyers. Pursuant to that tenet, attorneys are not responsible for the substantive ends sought by their clients. Thus, if the client seeks socially beneficial ends, that is a good thing, and if the client seeks socially detrimental ends, that is a bad thing, but in neither instance is the attorney responsible for the ends sought by the client. As long as the attorney neither engages in illegal or unethical conduct, nor assists the client in engaging in conduct that is illegal, the attorney is not to be judged based upon the social utility of the client’s ends. Rather, the attorney is only to be judged according to the efficacy of the attorney’s efforts to assist the client in seeking his or her desired objectives.²⁰⁵

The critique of craft technical professionalism for lawyers rejects the non-accountability tenet. It holds that lawyers cannot reasonably disclaim responsibility for the assistance they provide in, or their failure to take steps to prevent, socially harmful conduct engaged in by their clients.²⁰⁶ In Sullivan’s terms, craft technical professional lawyers are subject to criticism for their failure to pay heed to the public spiritedness component of the professional contract.²⁰⁷

The recent wave of corporate scandals provides an example of the forcefulness of the critique of craft technical professionalism for lawyers. The lawyers for Enron were “the smartest guys in the room,”²⁰⁸ and utilized their ample technical skills to develop or approve a series of complex, aggressive, and cutting edge transactions designed to serve their client’s goals in demon-

²⁰² GLENDON, *supra* note 117, at 102-08.

²⁰³ See, e.g., Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U.L. REV. 63, 73 (1980); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36 (1978).

²⁰⁴ See, e.g., DAVID LUBAN, *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 83, 90 (David Luban ed. 1983); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978).

²⁰⁵ See, e.g., Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 77-78 (1998); Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 75, 86-88 (2000); LUBAN, *supra* note 204, at 90; Postema, *supra* note 203, at 73; Schwartz, *supra* note 204, at 673-74; Simon, *supra* note 203, at 36.

²⁰⁶ See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 154-55 (1988); Crystal, *supra* note 205, at 89; Postema, *supra* note 203, at 82.

²⁰⁷ See *supra* notes 25-28 and accompanying text.

²⁰⁸ See BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (2003).

strating profitability to investors.²⁰⁹ Though these transactions demonstrated considerable proficiency from a craft perspective, they also ignored the potentially devastating impact they might have on the corporation's employees, shareholders, investors, and on the public at large. The collapse that followed amply demonstrates the bankruptcy of a craft technical professionalism unbridled by a commitment to the broader public interest.²¹⁰

The foregoing discussion should not be read to suggest that technical proficiency and commitment to craft are not important aspects of a theory of lawyer professionalism. However, a commitment to craft alone, without reference to the public spiritedness aspect of Sullivan's account of professionalism, is not adequate to the promotion of the common good that Sullivan seeks. Therefore, attention will now be turned to Sullivan's categories of professionalism that expressly place focus on the public spiritedness aspect of the professional contract.

C. *Individual Civic Professionalism*

Critics of craft technical professionalism for lawyers and its non-accountability tenet have developed an alternative conception of proper professional role and responsibilities for lawyers that focuses on lawyers' obligations beyond those to their particular clients, including those to involved third parties, the justice system, and the public interest as a whole. Because these critics place emphasis on the public spiritedness prong of the professional contract, they plainly fall within Sullivan's civic professionalism category. The two most prominent scholars who take this approach are professors David Luban and William Simon. Luban contends that lawyers should turn to common morality to determine the degree of support to lend to client efforts to achieve particular objectives.²¹¹ Simon contends that lawyers should be guided in such decisions

²⁰⁹ See generally, W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1170-71 (2005).

²¹⁰ Of course much, if not most of the misfeasance and malfeasance committed in conjunction with Enron's collapse was engaged in by professionals other than lawyers. See, e.g., Rhode & Paton, *supra* note 178, at 10. However, the questions raised about craft technical professionalism generally remain the same. It is also the case that many of the lawyers and other professionals who served the corporation had strong personal financial ties to the corporation's profitability, whether in the form of stock options, performance-based compensation, or just keeping well paying jobs. Thus, their extreme efforts to develop transactions that would enhance corporate profitability might also be described as an example of market technical professionalism, as well as an example of craft technical professionalism. For much more detailed and sophisticated accounts of Enron's collapse, see, e.g., McLEAN & ELKIND, *supra* note 208; William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002); John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269 (2004); Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968 (2002).

²¹¹ See, e.g., LUBAN, *supra* note 206, at 129-33, 148-49.

by notions of the legal merit of the positions being advanced.²¹² What is common to both positions is that lawyers *are* deemed to be accountable for the ends pursued by their clients, and where such ends are socially destructive, lawyers are charged with taking action to deter the client from engaging in deleterious conduct.²¹³ Such actions may range, on the least intrusive end, from dialogue with the client to, on the most intrusive end, disclosure of confidential information to authorities responsible for preventing such conduct.²¹⁴ As discussed above, probably the best example from Sullivan of a professional engaged in this form of civic professionalism is his description of Louis Brandeis in his role as counsel for the situation.²¹⁵

Not surprisingly, the type of civic professionalism advocated by Luban and Simon has engendered its own series of critiques. Such critiques have labeled the approach described in the previous paragraph as the “moral activist” approach.²¹⁶ These critiques take a number of forms. First, critics challenge lawyer efforts to privilege their own assessments of appropriate ends over those of their clients on grounds of agency principles.²¹⁷ Second, critics challenge the implicit notion that lawyers have a greater capacity to determine appropriate objectives than their clients.²¹⁸ Third, such critics question the very idea that objective assessments can be made of which ends are more or less appropriate to pursue in circumstances of moral pluralism and incommensurable values.²¹⁹ Critics also attack the moral accountability approach on pragmatic grounds. They question whether busy lawyers have either the time or the training to engage in the difficult determinations of morality or legal merit called for under Luban and Simon’s approaches.²²⁰ Moreover, powerful economic and social forces push lawyers in the direction of supporting, rather than opposing their clients’ objectives, making the kind of independence called for by the moral accountability approach difficult if not impossible.²²¹

²¹² See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 138 (1998).

²¹³ See, e.g., Paul R. Trembley, *Moral Activism Manque*, 44 S. TEX. L. REV. 127, 149 (2002).

²¹⁴ *Id.* at 150-51.

²¹⁵ See *supra* note 86 and accompanying text.

²¹⁶ See, e.g., Kruse, *supra* note 155, at 422; Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COL. L. REV. 1, 61 (2003); Trembley, *supra* note 213, at 127; Paul R. Trembley, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9 (1995). Luban himself describes his position in terms of moral activism. See LUBAN, *supra* note 206, at 160.

²¹⁷ See, e.g., Pepper, *supra* note 198, at 615.

²¹⁸ *Id.* at 617-18.

²¹⁹ See, e.g., Kruse, *supra* note 155, at 389; W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 370-76 (2004).

²²⁰ See Trembley, *Practiced Moral Activism*, *supra* note 216, at 9.

²²¹ See Dolovich, *supra* note 139, at 1635-38 (noting but rejecting the argument); Trembley, *Moral Activism Manque*, *supra* note 213, at 152 (same).

It is not my objective here to analyze in great detail the substance of the moral accountability view or that of its critics.²²² I have long been attracted to Luban and Simon's focus on the public spiritedness component of the professionalism contract, and have explicitly relied on Simon's theory in other contexts.²²³ Nonetheless, over time, I have come to realize the forcefulness of the above critiques, at least in the context of the practice of law on behalf of private clients.²²⁴ In any event, the particular feature of Luban and Simon's approaches that I wish to focus on here is the fact that they are exclusively concerned with the role of an individual lawyer engaged in representing a particular client. That is why I have labeled this approach "individual civic professionalism."

In contrast to the approach taken by Luban and Simon, Sullivan's work amply demonstrates that there is an important collective component to civic professionalism that the two scholars fail to address adequately. Sullivan recognizes that individual professionals develop "human capital" through the specialized training they receive and the expert knowledge and skills they develop as a result.²²⁵ However, Sullivan goes on to point out that individuals can only make use of such human capital as a result of being part of a broader professional community.²²⁶ For example, the broader professional community licenses or certifies the individual professional's membership, which in turn allows the individual to "trade on" the status of being a member of the professional group.²²⁷ However, the value of that status is dependent upon the social capital of the profession as a whole, developed by creating "the expectations of competence, trustworthiness, and honesty generated by a community of practitioners through sustained cooperation."²²⁸ In turn, the profession as a whole can only develop such social capital by achieving the legitimacy that comes from upholding the public spiritedness prong of the professional contract.²²⁹ In short, the

²²² For more detailed discussions of the views of Luban and Simon, see, e.g., Kruse, *supra* note 155, at 422-434; Scott R. Peppet, *Lawyer's Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 504-08 (2005); Wendel, *Civil Obedience*, *supra* note 219.

²²³ See Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Government Lawyer Ethics*, 56 CASE W. RES. L. REV. 345, 365-69 (2005); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 817-18 (2000).

²²⁴ I continue to believe that Simon's approach provides an appropriate foundation for a theory of appropriate professional role and responsibilities for government lawyers. See Berenson, *Hard Bargaining*, *supra* note 223.

²²⁵ SULLIVAN, *supra* note 10, at 181.

²²⁶ *Id.* at 182.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 183. Sullivan sums up these "three constituent features of professionalism" as follows: "(1) professional skill is human capital that (2) is always dependent for its negotiability upon some collective enterprise, which itself (3) is the outcome of civic politics in which the freedom of the group to organize for a specific purpose is balanced by the accountability of that

moral activist view falls short in its failure expressly to connect directly the work of individual lawyers to the broader community of legal practitioners, and in turn to connect that community of practitioners to the civic polity as a whole.

D. *Collective Civic Professionalism*

Recent works by the foremost among an emerging generation of scholars in the field of attorney professional role and responsibility go further than the moral activist works in expressly taking a collective approach to lawyer professionalism. For example, in *Professionalism as Interpretation*,²³⁰ Professor W. Bradley Wendel equates professionalism for lawyers with fidelity to the text of legal rules.²³¹ In other words, lawyers should not view the law as something to be “gotten around” in an effort to benefit clients,²³² but rather as an “achievement” that represents “the final settlement of contested issues (both factual and normative) with a view toward enabling coordinated action in our highly complex, pluralistic society.”²³³ Wendel therefore expressly connects the lawyer’s work to the broader collective endeavor of debating and enacting laws through the political process. Moreover, Wendel notes that laws are never so unambiguous as to obviate the need for interpretation.²³⁴ In engaging in the necessary act of interpretation, lawyers are required by the principle of fidelity to law to adhere to “non-textually bound interpretive conventions and practices” that are accepted in the community of legal practitioners.²³⁵ Thus, in addition to connecting individual lawyers to the broader political community, Wendel connects individual lawyers to a community of legal practitioners.

Although at least one commentator has linked Wendel’s earlier work to the client-centered approach of the supporters of craft technical professionalism discussed above,²³⁶ Wendel goes further than both the craft technical professionalism scholars and the individual civic professionalism scholars in expressly recognizing a collective component to lawyer professionalism. Nevertheless, like the two sets of scholars discussed above, the exclusive focus of Wendel’s work is on the representation of clients by individual lawyers. However, it must be acknowledged that a large part of most lawyers’ work is not performed in

group to other members of the civic community for furtherance of publicly established goals and standards.” *Id.* at 184.

²³⁰ See Wendel, *supra* note 209, at 1167.

²³¹ *Id.* at 1168-69.

²³² *Id.* at 1170.

²³³ *Id.* at 1169.

²³⁴ *Id.* at 1171.

²³⁵ *Id.*

²³⁶ Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer’s Point of View*, 16 YALE J. L. & HUMAN. 45, 76 (2004) (discussing Wendel, *Civil Obedience*, *supra* note 219, and noting that Wendel accords significantly more weight to clients’ lawful objectives than either Luban or Simon).

isolation. Indeed, lawyers often work on matters in groups of varying sizes, and most lawyers practice in the context of law firms of varying sizes as well.²³⁷ Aside from individual client representation, other portions of lawyers' work involve groups of varying sizes including bar associations, and a host of other formal and informal associations.

Sullivan's book focuses on the importance of such groups and institutions to a proper conception of civic professionalism. According to Sullivan:

Institutions are the entering wedge through which moral meaning comes to affect technical and instrumental activities. Institutions "moralize" the performance of instrumental functions by embedding them in a network of social expectations. Institutions are thus a key generator of social capital, resources of trust upon which individuals can draw as they pursue their own purposes and to which they contribute by practicing their occupation responsibly. Thanks to institutions, the task of making a living or solving a technical problem, or practicing the arts, or figuring out how to live together can become a focus for enriching character, friendship, and self-transcending loyalty. These processes in turn generate vital social energy upon which civic culture can draw.²³⁸

In addition to giving meaning to the work of individual professionals, such institutions themselves engage with other interests in broader civil society.²³⁹ Where such interactions are positive, individual professionals will be encouraged to further such civic engagement, to the betterment of society.²⁴⁰ Additionally, individual professionals and the institutions they belong to will benefit from such interactions by developing social capital in the form of good will, public support, and prestige.²⁴¹

There are also pragmatic reasons why an account of civic professionalism on the part of lawyers must include a group or institutional dimension. First, given that lawyers earn their living from the practice of law, and given the fact that some level of material human need will always be present, there will always be forces pushing lawyers in the direction of market technical professionalism. Second, because lawyers are agents and social norms will always impel lawyers toward a certain level of pride in the substance of their work,

²³⁷ As of 2000, approximately 60% of lawyers worked in firms of more than 5 lawyers. Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 Hous. L. Rev. 309, 310 n.2 (2004).

²³⁸ SULLIVAN, *supra* note 10, at 186 (citations omitted).

²³⁹ *Id.* at 285.

²⁴⁰ *Id.*

²⁴¹ *Id.* On the other hand, where such interactions are negative, individual professionals are likely to withdraw from civic engagement. *Id.*

there will similarly always be forces pushing lawyers in the direction of craft technical professionalism. To maintain the public spiritedness in individual client representation that is the hallmark of individual civic professionalism, individual lawyers will need the support of broader professional groups and institutions.²⁴²

Moreover, because the above-described forces push toward both forms of technical professionalism, the ability of lawyers to work toward civic professionalism in the context of their representation of clients on particular matters may have inherent limitations. Thus, an effort to focus on the non-client representation work of lawyers seems appropriate. However, in light of the above-described forces, it is also likely that the majority of lawyer work will be devoted to client representation and that a relatively smaller portion of lawyer work will be devoted to matters other than client representation. While this fact might present a significant limitation to each individual lawyer's ability to pursue a form of civic professionalism, by banding together in groups and institutions and aggregating the non-client specific work of large numbers of lawyers, the profession as a whole may have a significant impact on moving in the direction of civic professionalism. Therefore, it appears that a theoretical account of the non-client specific work of lawyers and the institutional and group settings within which it is performed would be useful.

E. Institutional Professionalism for Lawyers

Despite the utility of a theoretical account of the non-client specific, group, and institutional work performed by lawyers to date, little, if any, scholarship relating to the professional role and responsibilities of lawyers has been devoted to that task.²⁴³ Much of the non-client specific work of lawyers takes place in the context of bar associations of varying sorts. Of course, when we discuss bar associations and related groups, we are talking about a very wide range of entities. For example, membership in bar associations may be mandatory or voluntary,²⁴⁴ and the geographic scope of such organizations ranges from nationwide to statewide, countywide, and citywide.²⁴⁵ Moreover, within each such bar association there are often numerous constituent groups, including those relating to specific practice fields and areas of the law.²⁴⁶ Additionally,

²⁴² *Id.* at 63.

²⁴³ A notable exception is Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193 (1996), which provides both a descriptive and a normative account of the work of bar associations.

²⁴⁴ See Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1 (1983); Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35 (1994).

²⁴⁵ Johnstone, *supra* note 243, at 193-94 & nn.3-4.

²⁴⁶ *Id.* at 199-200.

there are separate groups or associations of lawyers organized according to specific areas of the law,²⁴⁷ or according to certain demographic characteristics.²⁴⁸ The range of other, less formal groups of lawyers, such as the American Inns of Court,²⁴⁹ is vast. Coming up with a unified theory regarding the appropriate role for such organizations and the lawyers within them will be a daunting task.

Presently, bar associations and similar organizations engage in a wide range of activities. Bar associations and their constituent groups propose and lobby for legislation believed to be in the interests of their members and society at large.²⁵⁰ Such associations also engage in public relations efforts to improve and enhance the image of the profession generally and their members in particular.²⁵¹ In addition, continuing legal and other education programs are provided for association members, lawyer non-members, and sometimes the public at large.²⁵² Some bar entities also support original research and scholarship relating to the legal profession.²⁵³ Finally, many such organizations have a direct involvement in the delivery of legal services. Many bar associations offer lawyer referral services,²⁵⁴ and increasingly, bar associations have become involved

²⁴⁷ The largest such organization is the Association of Trial Lawyers of America (ATLA), which presently claims 56,000 members. See ATLA Homepage, *About ATLA*, available at <http://www.atlanet.org/about/index.aspx> (last visited Jan. 17, 2006). Other such organizations include the American Academy of Matrimonial Lawyers and the American Immigration Lawyers Association. See generally, Johnstone, *supra* note 243, at 194 & n.5.

²⁴⁸ For example, the National Bar Association (NBA) represents the interests of African-American lawyers, see NBA Homepage, <http://www.nationalbar.org/welcome.shtml> (last visited Jan. 17, 2006), and the Hispanic National Bar Association (HNBA) claims to be “the national voice of the Hispanic legal community.” HNBA Homepage, <http://www.hnba.com/> (last visited Jan. 17, 2006).

²⁴⁹ The American Inns of Court (AIC) is a voluntary association of lawyers, judges, and other legal professionals devoted to improving “the skills, ethics, and professionalism of the bench and bar.” AIC Homepage, *General Information*, <http://www.innsocourt.org/Content/Default.aspx?Id=2> (last visited Jan. 17, 2006).

²⁵⁰ Johnstone, *supra* note 243, at 228. In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the United States Supreme Court held that the First Amendment prohibits a mandatory bar association from using member dues to support political or ideological activities with which the member disagrees. See Johnstone, *supra* note 243, at 204-04. Such associations currently provide a “check off,” pursuant to which members may opt to withhold the portion of their annual dues deemed to relate to such protected activity. See, e.g., CAL. BUS. & PROF. CODE ANN. § 6140.05 (West 2005) (requiring \$5 deduction pursuant to *Keller*).

²⁵¹ See, e.g., Thomas E. Richard, *Professionalism: What Rules Do We Play By?*, 30 S. U. L. REV. 15, 29-30 (2002) (calling on ABA to mount a public relations campaign to change public perceptions of lawyers).

²⁵² See Johnstone, *supra* note 243, at 206.

²⁵³ For example, the American Bar Foundation is “the largest empirical research center on law and legal institutions in the United States[.]” *id.* at 202, and has been the source of a host of very important studies regarding the profession and its members.

²⁵⁴ See generally, Katherine Huneke & Nathan Mintz, *Current Developments, Lawyer Referral Services and the Model Rules: Balancing Legal Accessibility with Professional Independence*, 15 Geo. J. LEGAL ETHICS 827 (2002).

in organizing the pro bono efforts of their members.²⁵⁵ The range of such activities similarly complicates the prospects of developing a normative account of the role of such organizations and their members.

Given a less than completely salutary past, there is some reason to be skeptical of a vision of civic professionalism that places bar associations in such a central role. After all, in the more distant past, the American Bar Association was an exclusionary organization,²⁵⁶ and in the more recent past bar associations have engaged in what can only be characterized as anti-competitive efforts to enhance the market power of lawyers.²⁵⁷ Indeed, scholars continue to criticize bar regulatory efforts on grounds of anti-competitiveness,²⁵⁸ despite the many other salutary activities engaged in by such entities in the present. Nonetheless, for reasons mentioned above, institutional involvement is an absolute necessity to achieving the type of civic professionalism that Sullivan advocates. And given their prominence and prevalence, it is likely that bar associations will form an important part of such an institutional professionalism.

As has already been suggested, questions outnumber answers in terms of developing a theoretical account of the role of such organizations vis-a-vis the civic community and the role of individual lawyers within such organizations. Perhaps even more fundamental are unanswered questions regarding the relationship between lawyers' client related and non-client related work.²⁵⁹ Answers to such fundamental questions go beyond the scope of this review essay, but hopefully will be the subject of future projects.

VI. CONCLUSION

With *Work and Integrity*, William Sullivan has offered lawyers and other professionals a powerful exhortation to recommit and reconnect to the public spiritedness component of their implicit contracts with the individuals and communities they serve. Though Sullivan's more extensive treatment of the legal profession and his effort to develop a theory of professionalism based on the concept of integrity are incomplete, his historically supported categorization of approaches to professionalism into technical and civic professionalism pro-

²⁵⁵ See, e.g., Patricia J. Brown & Peggy Cornelius, *Dispelling the Myths of Pro Bono*, 32 ARIZ. ATT'Y 15, 16 (1996) (discussing the 1996 ABA Pro Bono Conference).

²⁵⁶ See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 65-66 (1976) (discussing the ABA's reluctance to admit African-American members until well past the middle of the 20th Century).

²⁵⁷ See, e.g., *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975) (striking down bar association minimum fee schedules on antitrust grounds).

²⁵⁸ See, e.g., Benjamin J. Barton, *Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulations*, 33 AZ. ST. L. J. 429 (2001); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977 (2003).

²⁵⁹ For an interesting account of the tensions between lawyers' private and pro bono engagements, see Scott Cummings, *The Politics of Pro Bono*, 54 U.C.L.A. L. REV. 1 (2004).

vides an extremely helpful lens through which to view three decades worth of scholarship regarding the appropriate professional role and responsibilities of lawyers. Combining that perspective with Sullivan's additional work concerning the importance of groups and institutions to a workable vision of civic professionalism, points out gaps in existing legal scholarship relating to issues such as the relationship between lawyers' client representation and their other work, lawyers' proper role and responsibilities in relation to institutions and organizations such as bar associations, and the proper role of such entities in the broader civic polity. Thus, in addition to his powerful description of professionalism's past, Sullivan leads us to important considerations regarding legal professionalism's future.

